No. 9881

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

JOHN THOMAS COLE and OMEGA TRICE COLE,

Appellants,

vs.

HOME OWNERS' LOAN CORPORATION, a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

APPELLEE'S BRIEF

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FRAYN PRINTING COMPANY

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SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

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STATEMENT OF THE CASE

This is an appeal in a proceeding under the Frazier-Lempke Act (Section 75 S of the Bankruptcy Act, 11 U. S. C. A. 203(s)) from an order of the District Court entered prior to the expiration

of the three-year stay period provided by the act, fixing the appraised value of certain farm property of the appellants upon which the appellee holds a mortgage, allowing the appellants a specified time prior to sale for redeeming the property at the appraised value and providing in the event the appraised value shall not be paid prior to the expiration of that time, that the property in question shall be sold subject to redemption as provided in the order.

The farm debtors' amended petition was filed March 9, 1940, order of adjudication and reference was entered the same day, order allowing the debtors to retain possession was entered March 13, 1940, and the order appealed from was entered April 16, 1941. The order appealed from recites in part:

". . . . . it was stipulated in open court that the court might hear and determine the issues presented by the petition of said Home Owners' Loan Corporation, and subsequent pleadings, upon their merits and that all objections to the form of procedure were waived . . . and the court heard evidence on behalf of the respective parties . . . and took the matter under advisement . . . that a reasonable annual rental for the use of said property would not be less than $400.00, but that inasmuch as the farm debtors have evidenced lack of interest in paying more than enough to cover taxes and water

charges against the property it does not appear to the court necessary to the disposition of the property to fix the annual rent . . . That there is no possibility of rehabilitation of the farm debtors, nor does their testimony permit the inference that they expect or desire the same."

Trial of the proceedings in the lower court consumed in excess of a day; a substantial amount of evidence, both oral and documentary, was introduced on behalf of each of the parties. None of this evidence is before this court on this appeal.

ARGUMENT

An examination of the points raised by appellants seems to disclose that the consist entirely of the contention urged in various forms that the order appealed from is contrary to the evidence or not sustained by the evidence. The rule, however, appears to be that contentions of this character will not be passed on in the absence of the evidence and that it will be presumed that the evidence supports the judgment or order appealed from. Dombrouski vs. Beu, 114 Fed. 2nd 91, and see Reconstruction Finance Corporation vs. Herring, 110 Fed. 2nd 320.

Appellee has no disposition to evade a discussion of the justice or propriety of the order appealed from, but it appears self-evident that in the absence of the evidence upon which such order is based appellee is in no position to enter upon such a discussion.

That an order of this kind may be entered prior to the expiration of the three year period under proper circumstances appears to have been definitely settled by the Supreme Court of the United States in Wright vs. Union Central Life Insurance Company, 311 U. S. 273, 61 S. Ct. 196, 85 L. Ed. ..... Such also was the holding of the Supreme Court in the earlier case of Wright vs. Vinton, Branch, etc., 57 S. Ct., 556, 300 U. S. 440, 81 L. Ed. 736, upholding the constitutionality of the act in question upon the specific ground, among others, that the act did not provide for an absolute stay for three years, but authorized an earlier termination in the discretion of the court.

In the Wright vs. Union Central Life Insurance Company case, supra, the Court approved the entry of an order terminating the stay period and directing a sale prior to the expiration of the three-year period. In this latter case it appears the order appealed from contained no provision allowing the farm debtor to buy the property at the appraised value prior to sale, and the order there under consideration was directed to be modified by the insertion of such a provision therein, and as modified allowed to stand. It is believed that the order appealed from here contains (Par. III-Page 51 of transcript) a provision which meets the requirements of the above case.

It is respectfully submitted that upon the author-

ity of the above cases the order appealed from on the record here ought to be affirmed.

The only two cases cited in appellants' brief are Borchard vs. California Bank, 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 95, and John Hancock Insurance Company vs. Bartels, 308 U. S. 180, 84 L. Ed. 176, 60 S. Ct. 221. To appellants at least, the decision in each of these cases seems to be predicated upon the proposition that the procedure provided for by the statute had not been followed. The statute provides in substance that any farmer failing to obtain accepptance of his proposal may amend his petition and ask to be adjudged a bankrupt, that his exempt property be set off to him and that he be allowed to retain the possession of the remainder of his property under the supervision and control of the court; that thereupon the referee shall appoint appraisers who shall appraise the property, and that after the value shall have been fixed by appraisal, the referee shall set off to the bankrupt his exemptions and shall further order that the possession of the remainder of the debtor's property shall remain in the debtor under the supervision of the court. In neither the John Hancock case nor the Borchard case was this done. In the John Hancock case the petition was dismissed at the threshhold, i.e., before any reference to the referee at all. In the Borchard case the matter was referred to the referee, but no stay order was entered, and the

mortgagee acquiesced for a period of nearly three years in the failure to enter such an order.

In the instant case it appears on the face of the record that the procedure laid down by the statute has been followed, i.e., the matter was referred to the referee, an appraisal was had and a stay order entered, and it was not until over a year after all this had been done that the order appealed from here was entered.

It is respectfully sumbitted that the order appealed from should be affirmed.

Respectfully,

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